



DOCKET FILE COPY ORIGINAL

DEPARTMENT OF CITY PLANNING
CITY OF NEW YORK
OFFICE OF THE COUNSEL

Joseph B. Rose, *Director*
Department of City Planning

MELANIE MEYERS, Counsel

PATRICIA C. PROTHRO
BARBARA J. ROSEN
EMILY SIMONS

RECEIVED WRITER'S DIRECT DIAL
(212) 720-3425

OCT 30 1997

October 29, 1997

Mr. William F. Caton, Acting Secretary
Office of the Secretary
Federal Communications Commission
1919 M. Street, N.W.
Washington, D.C. 20554

VIA EXPRESS MAIL

Re: Preemption of State and Local Zoning and Land Use Restrictions on the Siting,
Placement, and Construction of Broadcast Station Transmission Facilities;
FCC 97-296 and MM Docket No. 97-182

Dear Mr. Caton:

Enclosed for filing, please find an original plus nine (9) copies of the Comments of the City of New York Department of Information Technology and Telecommunications and the Department of City Planning of the City of New York, on behalf of the City of New York, in the above matter. Please distribute one copy of these comments to each of the Commissioners. Thank you.

Sincerely,

Melanie Meyers
General Counsel
Department of City Planning
City of New York

c: International Transcription Service

22 Reade Street, New York, N.Y. 10007-1216 Room 2N
FAX (212) 720-3219

049





DOCKET FILE COPY ORIGINAL

DEPARTMENT OF CITY PLANNING
CITY OF NEW YORK

OFFICE OF THE COUNSEL

Joseph B. Rose, *Director*
Department of City Planning

MELANIE MEYERS, Counsel

PATRICIA C. PROTHRO
BARBARA J. ROSEN
EMILY SIMONS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

WRITER'S DIRECT DIAL

(212) 720-

RECEIVED

OCT 30 1997

In the Matter of)

Preemption of State and Local)
Zoning and Land Use Restrictions on)
on the Siting, Placement and)
Construction of Broadcast Station)
Transmission Facilities)

MM Docket No.97-182

FCC 97-296

To: The Commission

COMMENTS OF THE DEPARTMENT OF CITY PLANNING
OF THE CITY OF NEW YORK AND THE CITY OF NEW YORK
DEPARTMENT OF INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS

Melanie Meyers
General Counsel
Department of City Planning
City of New York
22 Reade Street
New York, New York 10007
(212) 720-3400

Benjamin Lipschitz
Telecommunications Counsel
City of New York
Department of Information Technology
and Telecommunications
11 Metrotech Center, 3rd Floor
Brooklyn, NY 11201

October 29, 1997



Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

RECEIVED

OCT 30 1997

FCC MAIL ROOM

In the Matter of)

Preemption of State and Local)
Zoning and Land Use Restrictions on)
on the Siting, Placement and)
Construction of Broadcast Station)
Transmission Facilities)

MM Docket No.97-182

FCC 97-296

To: The Commission

COMMENTS OF THE DEPARTMENT OF CITY PLANNING
OF THE CITY OF NEW YORK AND THE CITY OF NEW YORK
DEPARTMENT OF INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS

The Department of City Planning of the City of New York and the New York City Department of Information Technology and Telecommunications, on behalf of the City of New York, respectfully submit these comments in response to the proposed rule making by the Federal Communications Commission (the "Commission") in the above matter, providing for the preemption of local zoning and land-use controls and procedures in connection with the siting of radio and television broadcast towers. The broadcast industry is of great importance to New York City and the City believes that it is crucial to work with the industry to ensure the siting of towers facilitating digital

television service ("DTV service") in an expeditious and appropriate manner. However, the City of New York recommends against adoption of the proposed preemption rule (the "Proposed Rule") because it results in an unnecessary and overly broad intrusion in local land use processes and fails to adequately balance a municipality's legitimate land use concerns regarding the siting of broadcast towers against the needs of the broadcast industry. The Proposed Rule is overly broad, given that it encompasses all radio and television broadcast towers, not simply those providing DTV service. Moreover, the Proposed Rule is unnecessary given the City's significant interest in promoting DTV service and the radio and television broadcast industry generally, an interest which is reflected in the City's land use controls governing the siting of radio and television broadcast towers.

1. The Proposed Rule is Unnecessary to Allow for Siting of DTV Broadcast Towers.

The Proposed Rule stems from the claim of the broadcast industry that local land use and zoning controls will impede the industry's ability to provide for rapid implementation of DTV service. That concern is not supported by existing evidence, including the fact recognized by the FCC that there are over 13,500 radio and television licenses outstanding, suggesting that local land use controls have not been an obstacle in siting broadcasting facilities. Local controls have not interfered with the radio or television industry in New York City. New York City is perhaps the principal center for the communications industry in the country, and a vast array of radio and television

transmission facilities (including broadcast towers) are located in the City to support the industry. Because of the City's interest in promoting the development and services of the broadcasting industry, existing zoning and land use controls allow for appropriate siting of broadcasting facilities, including towers, in a manner that does not interfere with the provision of wide ranging television and radio broadcasting services.

Many of the broadcast towers existing in the City have been located on an as-of-right basis -- *i.e.* permitted without any discretionary review -- under the City's Zoning Resolution. While a special permit from the Board of Standards and Appeals is required for "non-accessory" radio and television towers (discussed in Section 3 below), towers that are constructed in connection with a principal use are permitted without additional review wherever the principal use is permitted by zoning. Thus, a broadcast tower constructed on the same lot as a radio or television studio would be permitted as-of-right in all general commercial and manufacturing districts. In addition, radio transmission towers have been found to be accessory to a New York City university operating a local radio station, allowing additional as-of-right opportunities for siting broadcast towers.

In practice, the City's zoning provisions have provided appropriate flexibility in siting broadcast towers, and radio and television stations have generally been able to locate within New York City without difficulty in siting the required transmission facilities. While subject to other zoning controls, such as height and setback

limitations, these additional regulations have not generally resulted in serious obstacles in siting broadcast towers. Rather, these additional restrictions have resulted in the industry frequently siting their facilities in the higher density commercial districts within New York City, often the most appropriate location for these towers. Because of the general flexibility in locating broadcast towers in New York City that exists under the City's Zoning Resolution, any FCC regulation preempting local zoning and land use controls regarding such towers is unnecessary.

2. The Rule Fails to Adequately Consider the Legitimate Land Use Concerns Involved in Siting Broadcast Towers.

New York City fully supports the further growth of the broadcasting industry and has a significant interest in furthering its citizens' access to advanced television services. At the same time, the City believes that this growth should take place in a manner which balances the need for accommodating broadcasting services with other concerns of the City and its citizens. As presented in the FCC Notice, however, the Proposed Rule would not permit a local government to consider the legitimate land use concerns raised by the siting of a large, often extremely tall transmission tower within a community. Rather, the Proposed Rule would only allow denial based on an "expressly defined and clearly stated health or safety objective." Aesthetics and effect on neighborhood character would play no role in a local government's consideration of an application to site a tower under the Proposed Rule. In addition, while the language of

the Proposed Rule is somewhat ambiguous as to intent, it suggests that zoning controls such as height and setback requirements applicable to any other building or structure in an area must be ignored for broadcast towers.

The Proposed Rule completely ignores, unnecessarily, the enormous visual impact one or a number of broadcast towers could have on a low-density residential community. The Proposed Rule treats all possible sites for a broadcast tower as equally available and viable, rather than letting a local government establish reasonable siting criteria governing the appropriate placement of broadcast towers. As such, under the Proposed Rule a well-established low density residential neighborhood could be faced with applications for several broadcast towers, even though such towers may be sited as-of-right in a higher density commercial portion of the same municipality. The residential neighborhood would be prevented from raising its objections to this inappropriate intrusion into an unsuitable location or from pointing out that the use would be permitted in, and better suited to, the nearby commercial neighborhood. Provided that a municipality makes reasonable accommodation for the siting of broadcast towers, as in New York City, it is imperative that municipalities be able to provide direction as to the appropriate location of the towers and to consider land use concerns in providing that direction.

These concerns are compounded by the fact that the Proposed Rule provides for FCC review of a denial, rather than local administrative or judicial review of such

denial, limiting the ability of local expertise to inform the appeal process.

3. The Time Periods Provided for in the Proposed Rule are Inadequate to Permit Full Consideration of the Land Use Issues Surrounding the Discretionary Siting of Transmission Towers.

The time periods provided for in the Proposed Rule are inconsistent with the time periods provided under the New York City Charter for the review and award of the special permit that would be required for the siting of non-accessory broadcast towers. (Again, as noted above, most towers in New York City have been sited on an as-of-right basis as accessory to a principal use permitted by zoning.) Under the New York City Zoning Resolution, non-accessory radio and television broadcast towers are permitted in all zoning districts, subject to the grant of a special permit by the Board of Standards and Appeals (the "BSA"). The BSA may consider the impact of the tower on the neighborhood, including the impact on privacy, light, quiet, and air of the neighborhood in deciding whether to grant or deny the special permit. The BSA may also impose conditions and siting requirements designed to minimize the effect of the tower on its neighbors.

In undertaking its review, the BSA is mandated by the New York City Charter to follow a three-part review. It is first required to undertake an environmental analysis complying with the requirements of the State and City Environmental Quality Review

laws and regulations. (See ECL sec.8-0101 et seq., 6 NYCRR Part 617, New York City Executive Order No.91 of 1977, as amended, and the Rules of Procedure for City Environmental Quality Review of 1991.) This analysis provides for a thorough analysis of the potential effects on the environment involved in a discretionary decision. Upon a preliminary environmental determination, the BSA must then refer the application to the local community board, (a local neighborhood planning group established by the New York City Charter), for its review and recommendation. Pursuant to the New York City Charter, the community board has 60 days from the time of the receipt of the application to hold a public hearing and to issue its recommendation. (NYC Charter sec.668(a)(2)). Subsequent to the community board's review, the BSA must hold its own public hearing and consider the recommendation of the community board prior to adopting a resolution approving or disapproving the application for a special permit.

This special permit process -- the same for all special permits awarded by the BSA -- would not fit within the time limits indicated in the Proposed Rule. Indeed, any time periods established in a Proposed Rule would have to be considerably longer than those provided in the current proposal to permit satisfaction of the review requirements established in the New York City Charter. However, the review process established by the Charter serves a significant function in connection with siting many important uses within the City which may have an impact on particular neighborhoods, and often benefits the facility by allaying community concerns. The time periods provided for in the Charter allow for a full consideration of the issues involved in siting a facility such

as a broadcast tower, including opportunity for considering alternative sitings and ways of reducing the effect of a facility on its neighbors. The review process also creates an opportunity for reaching a consensus with the affected community on the siting of the facility and allaying the community's concern that uses are being imposed on them without local involvement. This type of informed, consensus building review cannot be accomplished within a 21- to 45-day review period. Rather, it is quite possible that an abbreviated review will be the subject of considerable litigation, resulting in delays in the implementation of the DTV system. The City urges the FCC to recognize the needs of local communities to review the relevant issues in an informed manner and to avoid vitiating legitimate local inquiry by imposing time constraints as limiting as those included in the Proposed Rule.

4. The Concerns Raised by the Proposed Rule are Compounded by the Fact that the Rule Preempts State and Local Land Use Controls With Regard to all Radio and Television Broadcast Towers.


The concerns raised by the Proposed Rule are compounded by the fact that it applies to all radio and television broadcast towers. The FCC Notice indicates that approximately 1000 towers will be required to provide for widespread DTV service, while over 13,500 licenses for radio and television already exist. Allowing those and any new license holders to site additional transmission facilities without regard to local land use and zoning constraints increases the possibility of inappropriate siting of

transmission towers many times over. Given the evidence that the existing radio and television operators have been successful in siting their needed facilities to date, the breadth of the Proposed Rule, encompassing both radio and television broadcast transmission facilities, is unnecessary.

For all of the above reasons, the City of New York recommends against the adoption of the Proposed Rule.

Respectfully Submitted,

Department of City Planning
City of New York

by 
Melanie Meyers
General Counsel
Department of City Planning
City of New York
22 Reade Street
New York, New York 10007
(212) 720-3400

Benjamin Lipschitz
Telecommunications Counsel
City of New York
Department of Information Technology
and Telecommunications
11 Metrotech Center, 3rd Floor
Brooklyn, NY 11201

October 29, 1997

CERTIFICATE OF SERVICE

I, Melanie Meyers, certify that an original plus nine (9) copies of the attached Comments of the City of New York Department of Information Technology and Telecommunications and the Department of City Planning of the City of New York, on behalf of the City of New York, dated October 29, 1997, was served on this 29th day of October, 1997, by Express Mail next-day delivery to each of the following persons:

Mr. William F. Caton, Acting Secretary
Office of the Secretary
Federal Communications Commission
1919 M. Street, N.W.
Washington D.C. 20554

Dated at New York, New York, this 29th day of October, 1997


Melanie Meyers

CERTIFICATE OF SERVICE

I, Melanie Meyers, certify that a copy of the attached Comments of the City of New York Department of Information Technology and Telecommunications and the Department of City Planning of the City of New York, on behalf of the City of New York, dated October 29, 1997, was served on this 29th day of October, 1997, by first class mail to each of the following persons:

International Transcription Service, Inc. (ITS)
2100 M Street, N.W., Suite 140
Washington, D.C. 20037

Dated at New York, New York, this 29th day of October, 1997


Melanie Meyers